tached to the practical effect of the proposed interpretation [9]—an added reason for regarding the stockholders as sureties. The decision reached by the court would seem to be the only one consistent with reason and the principles of equity.

ALLEGATIONS AS TO BENEFICIARIES IN ACTIONS FOR DEATH BY WRONGFUL ACT.—It is a well-settled rule of the common law that an action for damages for the wrongful death of a person cannot be maintained by his personal representative or his heir; since such a right is one personal to the decedent and, as such, abates with his death.[1] The rule is expressed in the maxim *actio personalis moritur cum persona.* It is supported also by the proposition laid down by Lord Ellenborough in the case of *Baker* v. *Bolton* [2] that "in a civil court, the death of a human being cannot be complained of as an injury."

This right of action, however, must be distinguished from the right to recover damages for loss of service suffered between the injury and the death, where death is not instantaneous. Such latter action can be maintained by the master, husband, parent, etc., for loss of services or consortium by reason of injury to the servant, wife, child, etc., as it is not a right personal to the deceased, but exists in favor of the person entitled to the services.[3]

To remedy partially this defect, the now famous Lord Campbell's Act was passed by Parliament in 1846.[4] It gave a right of action to deceased's "wife, husband, parent, and child" where the injuries causing the death were such that the deceased, if death had not resulted therefrom, might himself have maintained an action for damages. The English rule seems to be that, since this right existed only by virtue of the statute, it could be enforced in favor of those persons alone who were named in the statute; and hence, where there were no such persons in existence, no cause of action could arise.[5] It would seem naturally to follow that the declaration in an action under the act must allege the existence of one or more persons entitled to recover, for otherwise no cause of action would be stated.

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[9] Worthen *v.* State (Ala.), 60 South. 686; Dixon *v.* Caledonian Ry., L. R. 5 App. Cas. 820, 43 L. T. 513, 29 W. R. 249, 45 J. P. 105.

[1] Osborn *v.* Gillett, L. R. 8 Ex. 88; Baker *v.* Bolton, 1 Camp. 493; Bligh *v.* Biddeford & S. R. Co., 94 Me. 499, 48 Atl. 112.

[2] *Supra.*

[3] Davis *v.* St. Louis, I. M. & S. Ry. Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; Covington Street Ry. Co. *v.* Packer, 72 Ky. (9 Bush.) 455, 15 Am. Rep. 725.

[4] Stat. 9 and 10 Vic. c. 93, §§ 1 and 2.

[5] See Seward *v.* Vera Cruz, L. R. 10 App. Cas. 59, Opinion of Lord Blackburn; Leggott *v.* Great Northern Ry. Co., L. R. 1 Q. B. 599, 45 L. J. Q. B. 557, 35 L. T. (N. S.) 334; Bradshaw *v.* Lancashire & Yorkshire Ry. Co., L. R. 10 C. P. 189, 44 L. J. C. P. 148, 31 L. T. (N. S.) 847; TIFFANY ON DEATH BY WRONGFUL ACT, 2 ed., § 23.

In this country most of the states have passed statutes similar to Lord Campbell's Act. These statutes, for convenience of discussion, may be divided into two general classes. The first class embraces those which, like Lord Campbell's Act, give a right of action to or in behalf of certain designated and limited classes of persons. And the second class of statutes are those which are so broad in their designation of persons entitled to recover that a failure of beneficiaries is impossible.

In construing the statutes of the first class—those that give a right of recovery to certain limited classes of persons—the American courts have usually followed the English rule as to the allegation of beneficiaries. They have generally, but not universally, reasoned that such statutes are in derogation of the common law, and are therefore to be strictly construed. Hence only those persons named in the particular statute are entitled to damages for the wrongful death. And finally, therefore, such persons must be alleged in the declaration to exist, for otherwise no cause of action can be shown and no right of recovery set out.[6] Such was the holding in the recent case of *Troll* v. *Laclede Gaslight Co.* (Mo.), 169 S. W. 337. And the same has been held under the Federal Employers Liability Act.[7] It would be absurd in such a case to

[6] Johnson *v.* Dixie Mining, etc., Co., 171 Mo. App. 134, 156 S. W. 33; Ruiz *v.* Santa Barbara, etc., Co., 164 Cal. 188, 128 Pac. 330; Webster *v.* Norwegian Min. Co., 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; Tenn. Cent. R. Co. *v.* Brown, 125 Tenn. 351, 143 S. W. 1129; Lahti *v.* Oliver Iron Min. Co., 106 Minn. 241, 118 N. W. 1018; Bartley *v.* Boston & N. St. Ry. Co., 198 Mass. 163, 83 N. E. 1093; Foster *v.* St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803. In an action by an administrator for the death of his decedent, the complaint is sufficient if it names the widow and children but does not allege that the action is brought for their benefit. Archibald *v.* Lincoln County, 50 Wash. 55, 96 Pac. 831. Where the statute provides that the damages "must inure exclusively to the benefit of the widow and children, if any, or next of kin," a widower suing for damages for the death of his wife must allege that there are no children, for if there are surviving children, they may recover damages to the exclusion of the widower. Bartlett *v.* Chicago R. I. & P. Ry. Co., 21 Okla. 415, 96 Pac. 468. So, where the statute gives the parents a right of action for the wrongful death of their son, only in case he has left no widow and children, the parents, in bringing their action, must allege the non-existence of the widow or children or both. Register *v.* Harrell, 131 La. 983, 60 South. 638. And where the statute allows the administrator to bring the action only in case the deceased leave no surviving child, the petition must allege that no child survives, and an allegation that deceased was "single and unmarried" is insufficient, as there may be adopted children. Hegberg *v.* St. Louis & S. F. R. Co., 164 Mo. App. 514, 147 S. W. 192. But a wife suing for the death of her husband need not negative the existence of minor children, the issue of the marriage, where her right of action is not conditioned on the non-existence of such children. Davis *v.* Ark. South. R. Co., 117 La. 320, 41 South. 587. And an allegation that deceased left surviving him a father and mother and two sisters (naming them) negatives the idea that he left other persons entitled to take under the statute. Pries *v.* Ashland Home Tel. Co., 143 Wis. 606, 128 N. W. 281.

[7] Farley *v.* N. Y., N. H. & H. R. Co., 87 Conn. 328, 87 Atl. 990; Melzner *v.* Northern Pac. Ry. Co., 46 Mont. 277, 127 Pac. 1002.

allow a personal representative to recover damages, and then have it later develop that there is no one to whom, under the statute, he could lawfully pay the money recovered. Alabama and Connecticut, however, have held that such a collateral fact as the existence of heirs at law need not be alleged, but will be presumed.[8] But on principle and authority, the majority holding is based on the sounder reasoning.

Likewise it is generally necessary under such statutes to allege dependence of the beneficiaries upon the deceased, or pecuniary loss to them because of his death, for the object of the statutes is usually to compensate relatives or dependents for pecuniary loss.[9] Such loss, however, will sometimes be presumed from a showing of certain relationships between the beneficiaries and the deceased, the relationship in question involving generally a legal obligation on the part of the deceased to support the beneficiaries or contribute to their support.[10] The statutes do not, as a general rule, contemplate the giving of damages because of mental suffering on the part of the beneficiaries.[11]

The second class of statutes—those providing inexhaustible classes of beneficiaries—exist in some States of the Union. Under

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[8] Columbus & W. Ry. Co. *v.* Bradford, 86 Ala. 574, 6 South. 90; Budd *v.* Meriden Electric R. Co., 69 Conn. 272, 37 Atl. 683. These cases can possibly be distinguished from the majority view in that a man may be presumed to leave "general heirs" but not "particular classes" of heirs or heirs "dependent upon him for support." Hence where the statute provides expressly or in effect for the distribution of the damages among a man's "heirs" the above presumption will supply the necessary allegation of existing beneficiaries in the declaration. But where recovery is allowed for the benefit of only a "wife," "husband," "child," or other particular class of heir or relative, or for the benefit of next of kin "dependent upon the deceased," there is no such general presumption of law, and omitted allegations in the declaration render it defective. See Farley *v.* N. Y., N. H. & H. R. Co., *supra;* Melzner *v.* Northern Pac. Ry. Co., *supra. Contra,* Ruiz *v.* Santa Barbara, etc., Co., *supra;* Webster *v.* Norwegian Min. Co., *supra.*

[9] West Chicago, etc., R. Co. *v.* Mabie, 77 Ill. App. 176; Luessen *v.* Oshkosh Electric, etc., Co., 109 Wis. 94, 85 N. W. 124; Tucker *v.* Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; Chicago, etc., R. Co. *v.* Bond, 58 Neb. 385, 78 N. W. 710; Denver, etc., R. Co. *v.* Spencer, 25 Col. 9, 52 Pac. 211. But see Cleveland, C. C. & St. L. Ry. Co. *v.* Champe (Ind. App.), 102 N. E. 868; Pennsylvania Co. *v.* Coyer, 163 Ind. 631, 72 N. E. 875.

[10] Presumption from relationship of wife and children to husband. Cleveland, etc., R. Co. *v.* Starks, 174 Ind. 345, 92 N. E. 54; Haug *v.* Great Northern Ry. Co., 8 N. D. 23, 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. Rep. 727. Same, it would seem, from relationship of husband and children to wife. See St. Louis, etc., R. Co. *v.* Sizemore, 53 Tex. Civ. App. 491, 116 S. W. 403. But no such presumption where deceased left surviving his mother, brothers, and sisters. Chicago, etc., Ry. Co. *v.* Young, 58 Neb. 678, 79 N. W. 556.

[11] West Chicago, etc., R. Co. *v.* Mabie, *supra;* Denver, etc., R. Co. *v.* Spencer, *supra;* Pierce *v.* Conners, 20 Col. 178, 37 Pac. 721. *Contra,* B. & O. R. R. Co. *v.* Noell, 73 Va. 394; Norfolk & W. Ry. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

these statutes provision is usually made for recovery of damages for the wrongful death by certain persons, if there be any such surviving the deceased; and then, in default of such surviving beneficiaries, provision is further made in various ways for some final disposition of the damages recovered in the action, no matter what circumstances may exist. It is manifest, therefore, that under these statutes there is no possibility of an entire failure of persons entitled to receive what damages are recovered. Although there may be no survivors of a certain class, there is bound to be, from the wording of the statute, some existing person or agency capable of taking the money recovered. The courts, in construing these statutes, have accordingly held that it is not essential, in order for a cause of action to exist under their provisions, for there to be survivors of any particular class or classes of beneficiaries. And therefore it is not necessary to allege the existence of such survivors in order for the plaintiff's declaration to state a cause of action.[12]

THE DUTY OF A CARRIER TO AWAKEN SLEEPING PASSENGER AT PLACE OF DESTINATION.—As incident to the proper care for the safety and comfort of passengers in alighting from trains, a duty is imposed upon common carriers to announce stations a reasonable time before arrival.[1] But attempts to stretch this obligation

[12] Distributees need not be named where a statute provides that the damages recovered shall be distributed among certain named relatives, if such survive, and if there are none such, then "to be disposed of in the manner authorized by law for the distribution of personal property of deceased persons." The statute then provides that, in default of all above named distributees, the property of the decedent shall escheat to the territory. Whitmer *v.* El Paso & S. W. Co. (C. C. A.), 201 Fed. 193. The same is true where the constitution provides that the general assembly may provide how the recovery shall go, and to whom belong, and until such provision is made the same shall form a part of the personal estate of the deceased (and no such legislative provision has yet been made). East Tenn. Tel. Co. *v.* Simms, 99 Ky. 404, 36 S. W. 171. Likewise where a statute provides that the amount recovered shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate, and that the recovery shall not be subject to any debts or liabilities of the deceased. Searle *v.* Kanawha & O. Ry. Co., 32 W. Va. 370, 9 S. E. 248. Although not directly so decided, the rule in Virginia is probably the same under a statute providing that, in default of designated classes of beneficiaries, "the amount so received shall be assets in the hands of the personal representative to be disposed of according to law." Va. Code 1904, § 2904, p. 110. See Baltimore & O. R. R. Co. *v.* Sherman, 71 Va. 602; Baltimore & O. R. R. Co. *v.* Wightman, 70 Va. 431, 26 Am. Rep. 384.

[1] Texas & N. O. Ry. Co. *v.* Richardson (Tex. Civ. App.), 143 S. W. 722; Central of Georgia Ry. Co. *v.* Carlisle, 2 Ala. App. 514, 56 South. 737; Brooks *v.* Phila. & Reading Ry. Co., 218 Pa. 1, 66 Atl. 872. But where the passenger knows that the station is that of his destination, it is no ground for complaint that there was no announcement. Gulf, C. & S. F. Ry. Co. *v.* Bagby (Tex. Civ. App.), 127 S. W. 254.